Supreme Court, U.S.
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No. 10-_____

In the Supreme Court of the United States

HARRIET BELL, INDIVIDUALLY AND ON BEHALF OF ALL SIMILARLY SITUATED PERSONS,
PETITIONER

v.

CALLAWAY PARTNERS, LLC, ET AL.,
RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employer satisfies the requirement of the FLSA's "salary basis" regulation, 29 C.F.R. § 541.602(a), that every exempt employee receive a minimum weekly amount "without regard to the number of . . . hours worked," where the employer requires employees who work less than 40 hours in a week to pay back missed hours with unpaid overtime hours in subsequent weeks?

List of Parties

During the discovery period, defendant Callaway Partners, LLC was purchased by Huron Consulting Group, Inc., which was subsequently added as a party defendant.

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OPINION BELOW

The August 26, 2010, opinion of the court of appeals, which is unpublished but unofficially reported at 2010 WL 3370611, is set out at pp. 2a-6a of the Appendix. The February 5, 2010, opinion and order of the district court is neither published nor reported.

BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on August 26, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

REGULATIONS INVOLVED

29 C.F.R. §§ 541.602 and 541.604 (reproduced in appendix)

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Callaway describes itself as an "accounting special services firm." (R-341-9, p. 2, ¶ 3).[1] Beginning in 2003, Callaway was engaged to staff a project for HealthSouth Corporation ("HealthSouth") involving a restatement of HealthSouth's financials (*Id.* at ¶¶ 5-7). For this project, Callaway hired

[1] Pursuant to Supreme Court Rule 12.7, citations are to the district court record.

several hundred "consultants," with varying degrees of accounting experience. (R- 65, Exhibit B, ¶4, 5, 7). Petitioner Bell and the opt-in plaintiffs (collectively, the "plaintiffs") were among those employed to work as consultants on the HealthSouth project (*Id.* at ¶ 8).

Callaway billed HealthSouth based upon the number of hours that the consultants worked. (R-341-9 at ¶¶ 10, 11). Callaway also paid the consultants based on the number of hours they worked. Callaway established an hourly pay rate for each consultant and paid for all hours worked (including hours over 40 per week) at that rate. (R-341-9 at ¶¶ 17-19).

Overtime work was scheduled by Callaway and, whenever scheduled, was mandatory. Callaway's "Employee Handbook" stated:

> Overtime
>
> Callaway Partners or clients may periodically schedule overtime or weekend work to meet business needs. . . . Failure to report for scheduled overtime work may result in discipline, up to and including immediate termination. (R-341-15, p.13)

Callaway regularly required its consultants to work overtime on the HealthSouth project.[2] The

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[2] *See* R-65 Exhibit B at ¶ 8; Exhibit C at ¶ 6; Exhibit D at ¶ 7; Exhibit E at ¶ 4; Exhibit F at ¶ 4.

average opt-in consultant's work week consisted of between 53 and 54 hours of work. (R-340-9, p. 381).

Consultants would occasionally work fewer than 40 hours in a particular week as a result of one or more partial work days. For example, a consultant might work eight hours per day on Monday through Thursday, but leave work after only 4 hours on Friday, for a total of 36 hours that week. Callaway would pay the employee for 40 hours despite the shortfall. It would, however, record a "deficit" for the missed hours. It would not pay for hours worked over 40 in subsequent weeks until the "deficit" had been repaid. (*Id.* at p. 8, ¶ 39). Thus, if the employee worked 44 hours the following week, Callaway would only pay for 40.[3]

Since the consultants could not refuse to work overtime, every "deficit" was inevitably repaid with unpaid overtime. Each consultant's pay came out to exactly what it would have been had Callaway deducted for the missed hours and paid for all actual overtime hours.

Callaway invoked the nomenclature of executive pay for pay system. It called the consultants' pay for the first 40 hours worked each week "salary." It called the pay for hours worked above 40 in a week "bonus." (*Id.* at p. 7-8, ¶¶ 35, 38). What Callaway called a "bonus," however, had none

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[3] Callaway's time records revealed that the "deficit" policy resulted in 54 instances over three years in which one of the plaintiffs acquired a "deficit" of hours and subsequently paid back the hours owed by working overtime hours without pay in subsequent weeks. (R-340, ¶¶ 4, 6; 340-10, pp 5-7).

of the attributes of bonuses typically paid to executives or professionals in the workplace. It was simply straight-time hourly pay.[4]

II. Decisions of the District Court and the Court of Appeals

On June 19, 2007, the district court conditionally certified an opt-in class under the Fair Labor Standards Act of all current and former Callaway employees who held the position of consultant and worked on the HealthSouth project at any time during the period from February 1, 2004, through February 1, 2007. (R-117).

On February 5, 2010, the district court entered an order granting Callaway's motion for summary judgment for defendant on all claims. (R-374) The district court's order was drafted by Callaway, at the request of the district court. (R-369, 372).

On August 26, 2010, the Eleventh Circuit issued an opinion affirming the district court's grant of summary judgment. Judgment was entered on the opinion the same day.

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[4] As noted below, courts have deemed reductions from *actual* bonuses for partial work day absences to be consistent with the salary basis test. Because actual bonuses are extras, rather than hourly pay, reducing them does not extract unpaid work from the employee.

REASONS FOR ALLOWING THE WRIT

A. Analytical Framework: The Governing Regulations

The FLSA requires that employees be paid overtime when they work more than 40 hours in a week. 29 U.S.C. § 207(a)(1). An exemption from the overtime pay requirements exists, however, for employees working in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

The Secretary of Labor has issued regulations providing that employees are exempt if (1) they are paid a "predetermined" weekly minimum amount of at least $455 and (2) perform the types of job duties set forth in the regulations for the exemptions. *See* 29 C.F.R. § 541.602 (salary basis requirement) and §§ 541.100 through 541.300 (executive, administrative, and professional exemptions). Petitioner and the opt-in plaintiffs contended that the pay practices of defendant Callaway Partners, LLC ("Callaway") violated the "salary basis" requirement of 29 C.F.R. § 541.602.

Section 541.602(a) requires that the employee receive, "each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation." The employee must receive the full amount "for any week in which the employee performs any work without regard to the number of days or hours worked":

> An employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.

29 C.F.R. §§ 541.602(a).

Section 541.602(b) sets out the permitted exceptions to this general rule. These include an exception for full day absences.[5] The employer may not, however, make deductions from salary for absences of less than a day. 29 C.F.R. § 541.602(a)(1).

Under 29 C.F.R. § 541.603, an actual practice of making improper deductions causes the employer to lose the exemption not only for the affected employees, but for all other employees in the same job classification. Plaintiffs contended below, and

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[5] Because the employer may deduct for a full-day absence, references in this petition to "missed hours" generally mean hours not worked as a result of partial-day absences. The number of "missed" hours in a partial day is the difference between 8 hours and the actual number of hours worked.

Callaway did not contest, that the "deficit" pay policy challenged, if shown to be improper, would have forfeited FLSA exemption for all plaintiffs.

Under, 29 C.F.R. § 541.604, an employer may pay additional compensation beyond the guaranteed minimum without running afoul of the salary basis requirement. Section 541.604 was enacted in its present form in 2004. The language of § 541.604 allows additional compensation to be "paid on any basis," and gives examples such as "flat sum, bonus payment, straight-time hourly amount," and the like. At the same time, § 541.604 expressly preserves the separate requirement of § 541.602 that the employee receive his or her minimum weekly salary:

> (a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. . . . Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

29 C.F.R. § 541.604(a).

B. The Writ Should Be Granted to Resolve a Split among the Circuits Created by the Ruling Below

The Eleventh Circuit's ruling that Callaway's arrangement complied with the salary basis test is the first such decision by any federal court. Both the Sixth and Seventh Circuits have held such an arrangement violates the salary basis test. These courts have correctly discerned that the repayment obligation generated by such a policy renders illusory the employee's receipt of the minimum "predetermined amount."

In *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993), the employer promulgated a "comp time" policy under which employees could "bank" overtime hours they worked and use the banked hours for additional time off. If an employee worked less than eight hours in a shift, her bank of accumulated overtime hours was charged for the shortfall. If she had not banked enough overtime hours, the shortfall generated a deficit that the employer termed "negative comp time," and she was required to repay the debt by working more overtime hours without pay. In affirming summary judgment for the employee, the court reasoned:

> When Klein was forced to go into negative comp time, she may not have been actually paid less, but she was going into a form of debt since any later accumulated comp time had to pay off that debt.

990 F.2d at 284.

Similarly, in *Martin v. W.E. Monks & Co.*, 1 F.3d 1241, 1993 WL 300332 (6th Cir. 1993), the Department of Labor successfully challenged the employer's claim that employees with partial day absences actually received their salaries, where the employer required them to "make up" the missed time with overtime hours in the following week. The Sixth Circuit agreed that this arrangement violated the salary basis test:

> In fact, in an apparent attempt to compensate employees with a "regular" amount, defendant Edwards instructed employees to declare that they worked forty hours in a week on their time sheets, regardless of their actual hours worked, to receive their allotted amount in pay. However, they were told to "make up" the following week any hours that they had actually worked below forty the previous week, thereby working more than forty hours during that second week.

Id. at *3.[6]

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[6]Courts have recognized, and the Department of Labor has issued opinions, upholding an employer's right to deduct for missed hours from supplemental amounts typically paid to exempt employees, such as leave banks, vacation time, discretionary bonuses, or other employment perks. *See Lovelady v. Allsup's Convenience Stores, Inc.*, 304 Fed. Appx. 301 (5th Cir. 2008); *Phillips v. Capital Toyota, Inc.*, 2006 WL 1408688 (E.D. Tenn. May 22, 2006); January 7, 2005 Opinion

The Eleventh Circuit did not address the "deficit" issue at all, but simply stated without analysis that Callaway had satisfied its obligation to pay a guaranteed weekly amount under 29 C.F.R. § 541.602(a). The court appears to have assumed that the obligation is satisfied whenever the employee receives a paycheck for the guaranteed weekly minimum amount, regardless of what conditions the employer attaches to the payment or what the employer later extracts in return for the payment. The court then treated the repayment of the hourly deficit with unpaid overtime hours as merely a method of providing "additional compensation" for overtime hours:

> [A]s we have previously determined, "as long as there is a non-deductible minimum, additional compensation on top of the non-deductible salary is permissible." And, while additional compensation is permissible, the regulations do not require additional compensation, nor do they prescribe a set method for setting up a bonus system. 29 C .F .R. § 541.604(a) ("An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary

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Letter from DOL (FLSA2005-7)). Callaway presumably called its straight-time hourly pay for overtime hours a "bonus" system, in hopes of invoking these decisions. The bonuses in those cases were true extras, rather than hurly pay, so that reducing them did not effectively extract unpaid work from the employee.

> basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. . . . Such additional compensation may be paid on any basis . . . .").

Opinion at 4 (citation omitted).

By citing to the language of 29 C .F .R. § 541.604(a) on "additional compensation," the lower court simply skirted the issue again. That provision's directive that "additional compensation may be paid on any basis" says nothing about extracting work without any compensation. Moreover, even if Callaway's "deficit" system were nothing but a method of additional compensation, the fact that it satisfies § 541.604(a) does not insulate it from scrutiny under § 541.602. Indeed, § 541.604(a) expressly allows additional compensation only "*if* the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis." (emphasis added)

The Seventh Circuit has recently confirmed that the system of pay it disapproved in *Klein* violated the salary basis test because it effectively generated a "reduction of salary":

> As we have said before, "when the regulation's interpretations state that a salaried employee's pay 'is not subject to reduction because of variations in the quality or quantity of the work performed,' a *reduction* of salary must

> have actually occurred for an employee to lose the exemption." *Klein v. Rush-Presbyterian-St. Luke's Med. Ctr.* 990 F.2d 279, 286 (7th Cir.1993).

Kennedy v. Commonwealth Edison Co., 410 F.3d 365, 370 (7th Cir. 2005)(citation omitted). As the Sixth and Seventh Circuits have acknowledged, where the employee must pay any partial work day deficit with unpaid overtime hours, the minimum "guarantee" is an illusion.[7]

The Eleventh Circuit's analysis could not contradict more directly the approach taken by every other court to have faced this issue. The urgency of resolving the schism is heightened by the fact that the Eleventh Circuit's approach affords a roadmap under which virtually any employer can thwart the salary basis test and effectively pay its exempt employees by the hour, merely by requiring enough overtime to cover the missed partial workday hours.

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[7]Although not addressed in the court of appeals' opinion, Callaway argued that the *Klein* and *Martin* decisions were effectively reversed by § 541.604, which was adopted in 2004. (R-374-23-24). Neither *Klein* nor *Martin* relied on an "additional compensation" analysis at all, but on a determination that generating a deficit to be repaid with overtime hours effectively reduces the minimum weekly salary. The DOL commentary to § 541.604 discusses numerous decisions whose holdings are adopted or rejected in the new regulations, and makes no mention of *Klein* or *Martin*. 69 Fed. Reg. 22122-01 (2004), WL 865626 at 119-20 (Apr. 23, 2004).

Conclusion

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-11086
Non-Argument Calendar

D.C. Docket No. 1:06-cv-01993-CC

HARRIET BELL, individually and on behalf of all similarly situated persons,

Plaintiff-Appellant,

versus

CALLAWAY PARTNERS, LLC,
HURON CONSULTING GROUP, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(August 26, 2010)

Before TJOFLAT, WILSON and COX, Circuit Judges.

PER CURIAM:

Plaintiff Harriet Bell is the class representative for an opt-in class of approximately

100 bookkeeper/ accountants ("Plaintiffs") who were hired as employee consultants by Callaway Partners, LLC ("Callaway") for a large-scale financial audit involving the restatement of HealthSouth Corporation following allegations that HealthSouth had perpetrated a multi-billion dollar accounting fraud. Callaway classified Plaintiffs as exempt from the Fair Labor Standards Act's (FLSA) overtime pay requirement.

Plaintiffs' pay consisted of two distinct components. First, Plaintiffs received a guaranteed weekly salary of $1600 or more that did not depend on the quality or quantity of the work performed. This weekly salary was reduced by one-fifth of the weekly salary for every full day a Plaintiff took off from work for personal reasons during the normal workweek without substituting Paid Time Off ("PTO"). But, a Plaintiff could work fewer than eight hours during any given workday without any reduction in his or her weekly salary. Second, Plaintiffs were eligible to receive additional incentive compensation (a "bonus") paid at a straight-time hourly rate based on the cumulative number of billable hours that Plaintiffs worked. Any bonus to be awarded was determined based on how many additional hours over forty a Plaintiff worked in a given week minus any "deficit" hours a Plaintiff had accumulated in past weeks. For example, if a Plaintiff worked seven and not eight hours on each regularly-scheduled workday in a given week, thus totaling 35 hours of work, he or she still earned the full predetermined weekly salary, but would not earn a bonus in a subsequent week until he or she

made up the bonus-hour deficit of five hours and then worked more than 40 hours in a given week.

Plaintiff Bell filed suit against Callaway on August 24, 2006, as a collective action under the FLSA, claiming that Callaway had violated the overtime provisions of the FLSA. The only issue considered by the district court was whether Callaway's pay system violated the salary basis test set forth in 29 C.F .R. § 541.602. The district court granted summary judgment for Callaway. The court held that Callaway's bonus practice complied with Department of Labor (DOL) regulations, and that Plaintiffs' claims that such practice violated the salary basis test were without merit. The court also found that Callaway had complied with DOL regulations regarding deductions
from salaries for workdays missed, and that Plaintiffs' claim that the manner in which Callaway calculated pay for weekend work constituted improper "partial day deductions" in violation of the salary basis test was also without merit. Plaintiffs appeal; they argue that the court erred in concluding that Callaway's bonus system did not violate the FLSA's overtime requirements.

The FLSA requires employers to pay employees "engaged in commerce or in the production of commerce" overtime when an employee works more than forty hours in a week. 29 U.S.C. § 207(a)(1). But, an exemption from the overtime pay requirement exists for employees in a "bona fide executive, administrative, or professional capacity" as defined by regulations of the Secretary. 29 U.S.C.

§ 213(a)(1). The class of Plaintiffs in this lawsuit are highly-educated accountants and Certified Public Accountants who, during their employment with Callaway, often made more than $100,000 per year. (R. 374 at 3.) Consequently, Plaintiffs fall under the overtime pay exemption.

An employee is considered "paid on a salary basis" if "he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541. 602. Plaintiffs argue that they were not paid on a salary basis because the amount of their bonuses fluctuated based on the cumulative number of hours worked. But, as we have previously determined, "as long as there is a non-deductible minimum, additional compensation on top of the non-deductible salary is permissible." *Hogan v. Allstate Ins. Co.*, 361 F. 3d 621, 625 (11th Cir. 2004) (citation omitted). And, while additional compensation is permissible, the regulations do not require additional compensation, nor do they prescribe a set method for setting up a bonus system. 29 C.F.R. § 541. 604(a) ("An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis . . . . Such additional compensation may be paid on any basis ....").

After a review of the record, we agree with the district court's well-reasoned analysis concluding that Callaway's bonus system conformed to the requirements of the salary basis test. (R.374 at 13-24.) While Callaway's incentive program may have been designed in a way that encouraged overtime work, as Plaintiffs argue it was, because it deducted for "deficit" hours, it nevertheless conformed to the requirements of the FLSA. Because there was a non-deductible minimum weekly salary, Callaway was free to structure any bonus program as it saw fit.

Plaintiffs also argue that Callaway violated the salary basis test when it deducted a full day's pay for personal days missed during the workweek (Monday through Friday) but did not pay Plaintiffs for a "full day" for partial days worked on Saturday or Sunday. Again, we agree with the district court's analysis concluding that such deductions were allowable under the provisions of 29 C.F.R. § 541.602(b)(1). (R.374 at 25-34.) Therefore, we hold that the district court did not err in finding Callaway's pay policies to be in compliance with the FLSA.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-11086

D.C. Docket No. 1:06-cv-01993-CC

HARRIET BELL, individually and on behalf of all similarly situated persons,

Plaintiff-Appellant,

versus

CALLAWAY PARTNERS, LLC,
HURON CONSULTING GROUP, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 26, 2010
For the Court: John Ley, Clerk of Court
By: Djuanna Clerk

§ 541.602 Salary basis.

(a) General rule. An employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

(b) Exceptions. The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:

(1) Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if

deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.

(2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related ac-accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of pro-viding compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits. Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are pro-vided under a State disability insurance law or under a State workers' compensation law.

(3) While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a writ-ten policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence.

(6) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement. However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.

(7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of un-paid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.

(c) When calculating the amount of a deduction from pay allowed under paragraph (b) of this section, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for

violations of major safety rules under paragraph (b)(4) of this section may be made in any amount.

§ 541.604 Minimum guarantee plus extras.

(a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least $455 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $455 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

(b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned.

The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Thus, for example, an exempt employee guaranteed compensation of at least $500 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $150 per shift without violating the salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary of $650 per week who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

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No. 10-684

IN THE
Supreme Court of the United States

HARRIET BELL, individually and on behalf on all similarly situated persons,

Petitioner,

v.

CALLAWAY PARTNERS, LLC, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition, where Respondent Callaway's bonus policy is expressly permitted by United States Department of Labor Regulations and there is no split in the circuits.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents Callaway Partners, LLC and Huron Consulting Group, Inc.* disclose the following entities:

CP4 Warbird Holdings, LLC – Successor to Callaway Partners, LLC

Huron Consulting Group Holdings LLC – Affiliate of Huron Consulting Group, Inc.

Huron Consulting Services LLC – Affiliate of Huron Consulting Group, Inc.

Huron Demand LLC – Affiliate of Huron Consulting Group, Inc.

Wellspring Management Services LLC – Affiliate of Huron Consulting Group, Inc.

*Huron Consulting Group, Inc. purchased Callaway after the events at issue and was added as a defendant under a successorship theory. It joins in all arguments of Callaway.

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INTRODUCTION

Petitioner has presented no "compelling reasons" to grant the Petition for Certiorari ("Petition"). There is no split in the circuits, and the Eleventh Circuit's decision did not create one.

The United States Department of Labor's ("DOL") regulations and opinion letters, as well as case law, all show that Respondent Callaway's bonus plan was entirely consistent with the DOL's salary basis test, and, therefore, Petitioners were exempt from the Fair Labor Standards Act's ("FLSA") overtime requirements. The regulations specifically state that additional compensation for hours worked beyond the normal workweek can be paid "on any basis," including a straight-time hourly basis, without affecting the exemption. 29 C.F.R. § 541.604(a). The limits on deductions from salary do not prohibit deductions from additional compensation and do not prohibit calculating such additional compensation by the hour rather than by the day. Callaway's bonus system is thus permissible "additional compensation" consistent with the salary basis test.

STATEMENT OF THE CASE

Respondent Callaway Partners, LLC ("Callaway"), an accounting professional services firm, was engaged by HealthSouth Corporation to perform accounting work on its financial restatement. (*Id.* R-341-8 p. 2 ¶¶ 3, 5-7.) Petitioner and the opt-in Petitioners (collectively, "Petitioners") are highly educated accountants and Certified Public Accountants who performed accounting services on the HealthSouth restatement. (*Id.* ¶¶ 8, 9;

R-115-1.) During their employment with Callaway, Petitioners often made in excess of $100,000 per year. (*See id.* p. 3, ¶ 17; R-96-2 ¶ 23.) Callaway classified Petitioners as exempt from the FLSA's overtime requirements. (R-341-8, p. 3, ¶ 12.)

A. The First Component of Petitioners' Pay: A Predetermined Weekly Salary

Petitioners' pay consisted of two independent components. (*Id.* ¶ 13.) First, Petitioners received a predetermined weekly amount in excess of $455 for all hours worked. (*Id.* ¶ 14.) The engagement letters provided to the Petitioners stated they would be paid a weekly salary. (*Id.* ¶ 16.) For example, Petitioner Bell's engagement letter stated: "Your weekly salary will be $1600 per week . . ." and "Your salary will be paid each Friday for the previous week." (*Id.* ¶ 18.)

Callaway also provided a PowerPoint presentation to Petitioners and others on the HealthSouth Project. Page 4 of the PowerPoint states that "[e]very employee assigned on the HealthSouth engagement is paid a guaranteed **weekly salary**." (emphasis in original). (*Id.* p. 4, ¶ 21.) Tracking the DOL's "salary basis" regulations under the FLSA (29 C.F.R. § 541.602), the PowerPoint states:

> For each week you are employed by Callaway, working on the HealthSouth engagement, you are entitled to your full weekly salary, subject to a few exceptions, listed below:
>
> > "Days" not worked for personal reasons, unpaid vacation, or illness (can be offset by PTO days earned)

* * *

(*Id.* pp. 4-5, ¶ 23.) The PowerPoint provided an example:

> A project professional takes 2 personal days and works 3 days, is paid 3/5 of their weekly salary, and reports 35 billable hours. This project professional's normal weekly salary is $1,000, $600 paid for this week after $400 deduction for 2 full day absences for personal reasons.

(R-341-15 p. 11.)

Thus, a consultant's salary would be subject to a deduction of one-fifth of the weekly salary if he or she took a full day off from work for personal reasons during the normal workweek without substituting Paid Time Off ("PTO"). (R-341-8 ¶ 24.)

Callaway did not pay Petitioners "by the hour," but rather paid Petitioners a predetermined weekly salary of $1600 or more, as "all or part" of their compensation. (*See* R-339-6 through 339-10.) This salary did not depend on the quality or quantity of work performed. (*See* R-341-8 p. 3, ¶ 15; 341-16.) Indeed, there were at least 67 weeks in which a Plaintiff averaged less than 8 hours of work per day, but still received his or her full pro-rata salary. (*See* R-339-14.) In addition, there were countless days on which Petitioners worked less than a full day but received their full pro-rata salary for that day. (R-341-8 p. 6, ¶¶ 25-26.) For example, Petitioners regularly worked only a part day on Fridays and then left early to commute home from Birmingham to the Atlanta area, but they received their full pro-rata salary for those days. (*Id.* p. 6, ¶ 26.)

B. The Second Component of Petitioners' Pay: The Bonus

The second component of Petitioners' pay was a bonus, which was additional compensation beyond Petitioners' predetermined weekly amount. (R-341-8, ¶ 35.) Callaway offered Petitioners a bonus because it wanted to provide incentive for Petitioners to work hard. (*Id.* ¶ 36.)

The engagement letters stated that Petitioners would be eligible for a bonus. (*Id.* ¶ 19.) The PowerPoint presentation explained the bonus in detail:

> For each week you are employed by Callaway, receiving a weekly salary while working on the HealthSouth engagement, you will earn a bonus for billable hours worked in excess of 40 hours. . . . Any deficit created in a given week (where billable hours are less than 40), will be carried forward and applied against future week's [sic] bonus calculation. This calculation has *no effect* on an employee's guaranteed weekly salary.

(*Id.* ¶ 39 (emphasis in original).) Beginning in early 2005, Callaway modified the plan and paid a bonus to Petitioners even when they worked fewer than five days during the normal week, as long as the total hours for the week averaged more than eight hours per day for the days worked in the normal workweek. (*Id.* ¶ 37.)

The PowerPoint illustrated how the bonus was calculated:

Bonus Example #1

A project professional works a full week, is paid their full weekly salary, and reports 55 billable hours. This project professional's weekly salary is $1,000 and is in good standing with Callaway. There is no "bonus hour deficit" from the previous week.

Billable Hours	55
Weekly Billable Hour Bonus Threshold	(40)
Bonus Hours Earned	15
Deficit from previous week	(0)
Weekly Bonus Hours	15
x effective hourly rate	$25.00
Weekly Bonus Amount	$375.00

Bonus Example #2

A project professional works a full week, is paid their full weekly salary, and reports 35 billable hours. This project professional's weekly salary is $1,000 and is in good standing with Callaway. There is no "bonus hour deficit" from the previous week.

Billable Hours	35
Weekly Billable Hour Bonus Threshold	(40)
Bonus Hours Earned	(5)
Deficit from previous week	(0)
Weekly Bonus Hours	(5) To be carried over to next week
x effective hourly rate	$25.00
Weekly Bonus Amount	$0

Bonus Example #2a

The next week, the same project professional works a full week, is paid their full weekly salary, and reports 60 billable hours. This project professional's weekly salary is $1,000 and is in good standing with Callaway.

Billable Hours	60
Weekly Billable Hour Bonus Threshold	(40)
Bonus Hours Earned	(20)
Deficit from previous week	(5)
Weekly Bonus Hours	(15)
x effective hourly rate	$25.00
Weekly Bonus Amount	$375

(R-341-15 pp. 8-11.)

Callaway's bonuses were paid in a straight-time hourly amount. (R-341-8.) Specifically, Callaway divided each Plaintiff's salary by forty (derived from the five-day work week) to determine the straight-time hourly bonus rate. (*Id.*) If a Plaintiff's weekly salary was $1,600, her bonus hour rate was $40.00 per hour ($1,600 ÷ 40 hours = $40.00).

The calculation of whether an employee earned bonus plan and any related deductions to the bonus had no effect whatsoever on the payment of the predetermined weekly salary. (*Id.* ¶ 40.) If a Plaintiff worked seven and not eight hours on each regularly scheduled workday, thus totaling 35 hours of work, he or she still earned the full predetermined weekly salary. (*Id.* ¶ 41.) Moreover, there is no evidence that Callaway ever required Petitioners to "pay back" any deficit in

hours billed under 40 in a week. The Plaintiff (in the foregoing example) simply would not earn a bonus until he or she made up the bonus-hour deficit of five hours and then worked over 40 hours in a week. (*Id.* ¶ 42.)

After two and a half years of discovery, Petitioners identified only 54 instances out of a collective 7,871 weeks worked in which they claim Callaway allegedly "deducted" from their bonuses because they had worked an insufficient number of hours in a previous week. Petitioners offered no evidence that in these 54 instances, or at any other time, that Callaway made any impermissible deduction from their predetermined weekly amounts (i.e., the salary). Callaway paid Petitioners their full weekly or pro-rata salaries in each instance. (*See* R-341-16.)

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit Correctly Held that Callaway's Bonus System Complied with the DOL's Regulations and There is No Split in The Circuits

A. The Appropriate Legal Framework

The FLSA requires that employees be paid overtime when they work more than forty hours in a week, unless an employee is "exempt." 29 U.S.C. § 207(a)(1). The Secretary of Labor has issued regulations providing that employees are exempt if (1) they are paid a "predetermined" weekly amount of at least $455 and (2) perform the types of job duties set forth in the regulations for the exemptions. *See* 29 C.F.R. § 541.602

(salary basis) and §§ 541.100 through 541.300 (executive, administrative and professional exemptions). These two requirements are commonly referred to as the "salary basis" test and the "duties" test. *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 625 (11th Cir. 2004). Only the salary basis test is at issue here. (R-291.)

The FLSA says nothing about the salary basis test; rather, the test was created by the Secretary of Labor. As the Supreme Court has explained, "Because the salary-basis test is a creature of the Secretary [of Labor]'s own regulations, his interpretation of it is, under [Supreme Court] jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted).

B. Callaway Did Not Improperly Deduct From Salary

Petitioners failed to present evidence that Callaway had a regular practice of improperly deducting from their salary. Rather, Petitioners identified only 54 out of a total of 7,871 weeks in which they allege that Callaway improperly "deducted" from their bonuses.[1] Pursuant to its bonus pay practice, Callaway factored in a "bonus hour deficit" in calculating the employee's bonus pay (but not salary) in the subsequent week or

1. In the District Court, Petitioners initially argued that Callaway's bonus system was a "subterfuge" for violating the salary basis test. (R-351 p. 3.) Apparently in light of the fact that they eventually only challenged 54 out of 7,871 instances, Petitioners failed to present argument on this issue on appeal and therefore it was abandoned.

weeks. Callaway's bonus pay practice was in compliance with the DOL's regulations and did not violate the salary basis test.

C. The Payment of "Additional Compensation" on a Straight-Time Hourly Basis Does Not Violate the Salary Basis Test

The DOL regulations require that exempt employees "regularly receive[] . . . a predetermined amount constituting all or part of" their compensation" which exceeds $455 each week. 29 C.F.R. § 541.602(a). The regulations *permit* – but do not require – employers to pay additional compensation to exempt employees on any basis, including a straight-time hourly bonus:

> An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. . . . *[T]he exemption is not lost if an exempt employee who is guaranteed at least $ 455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.*

29 C.F.R. § 541.604(a) (emphasis added).

The Eleventh Circuit has held that additional compensation can be paid to an exempt employee "as long as there is a non-deductible minimum" salary. *Hogan*, 361 F.3d at 625. Other courts have further held that additional compensation may be paid on a straight-time hourly basis without destroying an employee's exempt status. *See, e.g.*, *ACS v. Detroit Edison Co.*, 444 F.3d 763, 768 (6th Cir. 2006) ("'straight-time' overtime compensation" to exempt employees does not violate the salary-basis test).

Consistent with § 541.604 and this case law, Callaway paid Petitioners bonuses on a straight-time hourly basis. There is no merit to Petitioners' argument that because Callaway paid them hourly additional compensation in addition to their weekly salaries, they were paid "by the hour," or that their salary therefore was not a salary. The DOL regulation expressly states additional compensation may be calculated in this exact way: by dividing the weekly salary by 40 hours to determine a "straight-time hourly amount," and then paying that amount on an hourly basis for hours over 40, in addition to paying the predetermined weekly salary. Whenever an employer pays a salaried employee who works more than 40 hours in a week his or her weekly salary plus hourly "additional compensation" of 1/40 of the weekly salary for any hours over 40, it is a mathematical tautology that the weekly salary plus the "additional compensation" equals the "straight-time hourly amount" times the total hours worked. An employer does not violate the DOL's salary basis test by doing exactly what that salary basis test expressly authorizes.

D. The DOL, Eleventh Circuit and Other Courts Have All Held That An Employer Is Authorized to Calculate the "Additional Compensation" by Any Method, and Is Not Prohibited from "Deducting" from Exempt Employees' "Additional Compensation"

The DOL regulations plainly recognize two forms of compensation for exempt employees (predetermined weekly salary and additional compensation), but those regulations state that only an "employer who makes improper deductions from *salary*" may lose the exemption. 29 C.F.R. § 541.603(a) (emphasis added). Nothing in the FLSA or the Secretary's regulations prohibited Callaway from "docking" a Plaintiff's bonus eligibility based on hours billed.

The DOL has issued two opinion letters establishing that employers may deduct from exempt employees' bonuses. In a November 3, 2006, Opinion Letter, the DOL stated there is no prohibition against deductions from the managers' bonus for bad checks or other cash shortages.

> Section 541.600(a) requires only that exempt employees be paid a guaranteed salary of at least $455 per week. Additional compensation above this salary amount is generally something that may be agreed upon between the employer and the employee. *The prohibition against improper deductions from the guaranteed salary under 29 C.F.R. § 541.602(b) does not extend to such additional compensation provided to exempt*

> *employees.* Therefore, it is our opinion that bad check and other cash shortage deductions from bonus payments paid to salaried exempt employees are permissible and do not affect the employees' exempt status under section 13(a)(1) of the FLSA so long as the bonus payments are bona fide and are not paid to facilitate otherwise prohibited deductions from the guaranteed salary.

Opinion Letter, FLSA 2006-24NA (Nov. 3, 2006), p. 2 (emphasis added),[2] *see also* Opinion Letter, FLSA 2006-24 (July 6, 2006) (Acting Administrator), p. 2. (R-341-3.) Callaway's bonus plan was consistent with these opinion letters.

Consistent with the Eleventh Circuit's decision, other courts have held that employers are permitted to deduct from exempt employees' bonus payments without violating the salary basis test. In *Lovelady v. Allsup's Convenience Stores, Inc.*, 304 Fed. Appx. 301 (5th Cir. 2008), the plaintiffs (convenience store managers) received a predetermined, weekly salary regardless of the number of hours they worked. *Id.* at 303. The plaintiffs were eligible for bonuses, and reductions to or deductions from those bonuses were permissible under the company's bonus plan. The plaintiffs argued that the "reduction-of-bonus" provisions in the bonus plan constituted "an impermissible docking of pay and

2. DOL opinion letters are entitled to great weight when they interpret the DOL's own regulations. *Archuleta v. Wal-Mart Stores, Inc.*, 543 F.3d 1226, 1232 n.7 (10th Cir. 2008); *see also Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002); 29 C.F.R. § 790.17(d).

destroy[ed] the exempt status of store managers." The Fifth Circuit rejected this argument. Relying on the DOL's regulations and an opinion letter, the Fifth Circuit held that deductions from the managers' bonuses are permissible under the salary-basis test:

> Deductions or reductions from bonus payments do not affect an employee's status as an exempt employee so long as the requisite minimum $ 455 salary is paid. "An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis." "The prohibition against improper deductions from the guaranteed salary under 29 C.F.R. § 541.602(b) does not extend to such additional compensation provided to exempt employees." Therefore, Allsup's' management bonus policy does not result in impermissible deductions that destroy [the plaintiff's] exempt status.

Id. at 304 (footnotes and citations omitted).

In *Phillips v. Capital Toyota, Inc.*, No. 1:05-cv-215, 2006 U.S. Dist. LEXIS 333622 (E.D. Tenn. May 22, 2006), the plaintiff was the parts manager at defendant car dealership. *Id.* at *4. The plaintiff was paid a fixed salary plus bonus compensation. *Id.* at *5. The dealership tracked the plaintiff's hours, and reduced his bonus

because of his hours. *Id.* Like Petitioners in this case, the *Phillips* plaintiff claimed he was not paid on a salary basis because his total compensation could be reduced based on the number of hours he worked. The court rejected the plaintiff's argument. Citing to the DOL regulations, the court concluded: "As these regulations make clear, the key is not whether an employee's overall compensation is subject to reduction, but rather if the predetermined amount is subject to reduction." *Id.* at *13. "Plaintiff's bonus and trip to Hawaii were not part of his predetermined amount of compensation. Therefore, they could be reduced based on the amount of hours Plaintiff worked without changing Plaintiff's status as an exempt employee under the FLSA." *Id.*

In *Coppage v. Bradshaw*, 665 F. Supp. 2d 1361 (N.D. Ga. 2009), the court held that the plaintiff was exempt even though the employer reduced his additional compensation based on negative commissions. The *Coppage* plaintiff was paid a salary of $1,153.85 per pay period; however, the company expected him to earn $2,307.70 per pay period in salary plus commissions. *Id.* at 1366. Under the company's pay practice, if the plaintiff earned less than that amount, the difference was carried forward to the following pay period as a negative commission balance. *Id.* Thus, any additional compensation earned in the following pay period was offset by this negative commission balance. Following the Secretary's regulations, the court held: "[W]here an exempt employee receives additional compensation above his guaranteed minimum salary, an employer may make deductions without destroying the salary basis." *Id.*

E. There Is No Split in the Circuits

The DOL regulations and opinion letters, the Eleventh Circuit's decision, *Lovelady*, *Phillips* and *Coppage* all reach the same conclusion: as long as an employer pays the predetermined amount (i.e., the salary), it can make deductions from employees' additional compensation without destroying the exemption.

The cases on which Petitioners rely, *Martin v. W.E. Monks & Co.*, No. 92-3729, 1993 U.S. App. LEXIS 20610 (6th Cir. Aug. 3, 1993) and *Klein v. Rush-Presbyterians-St. Luke's Med. Center*, 990 F. 2d 279 (7th Cir. 1993), are no longer good law. Those cases only purported to interpret the DOL's *former* salary basis regulation, 29 C.F.R. § 541.118. Unlike the new regulation that Callaway and the Eleventh Circuit relied upon, § 541.604(a), the old regulation did not expressly state that it was consistent with the salary basis test for additional compensation to be paid on an hourly basis. Subsequent to *Klein* and *Martin*, the new regulation was issued by the DOL and the DOL issued two opinion letters (cited above) interpreting the new regulation and making it clear that employers can deduct from additional compensation for any reason. Thus, Petitioners' cited case law is not persuasive authority, and the Eleventh Circuit's decision did not create a split in authority.

There is likewise no merit in Petitioners' suggestion that § 541.604(a), the DOL's opinion letters, and the *Lovelady* and *Phillips* cases only allow deductions from "fringe benefits" or "discretionary bonuses." Nothing in § 541.604(a), the opinion letters, or the case law

recognizes such a distinction. As discussed above, the DOL does not prohibit any deductions from additional compensation, regardless of whether that compensation is based on hours worked or something else. In short, the DOL's restrictions on deductions from salary do not extend to additional compensation provided to exempt employees, regardless of the form of the additional compensation.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents request that the Petition be denied.

Respectfully submitted,

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